UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the day of 19th two thousand and six.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. ROGER J. MINER,
HON. CHESTER J. STRAUB,
Circuit Judges.

Dhanwattie Khan,

Petitioner,

v.

No. 04-5172-ag

Alberto R. Gonzales,[1]

Respondent.

FOR PETITIONER: Michael P. DiRaimondo (Marialaina L. Masi, Mary Elizabeth Delli-Pizzi, of counsel), Melville, NY

FOR RESPONDENT: M. Andrew Stover, Assistant United States Attorney (for Matthew D. Orwig, United States Attorney for the Eastern District of Texas), Plano, TX

AFTER ARGUMENT AND UPON DUE CONSIDERATION, it is hereby ORDERED,

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[1]United States Attorney General Alberto R. Gonzales is substituted as Respondent. *See* Fed. R. App. P. 43(c)(2).

ADJUDGED, AND DECREED, that this petition for review of a decision of the Board of Immigration Appeals ("BIA") be DENIED.

Dhanwattie Khan, through counsel, petitions for review of an order by Board of Immigration Appeals ("BIA") Member Juan P. Osuna denying her motion to reopen based on the ineffective assistance of her prior counsel. *In re Dhanwattie Khan*, No. A 73-595-659 (BIA Aug. 30, 2004). We assume that the parties are familiar with the underlying facts and procedural history of the case.

This Court reviews the BIA's denial of a motion to reopen for abuse of discretion. *See Kaur v. BIA*, 413 F.3d 232, 233 (2d Cir. 2004) (per curiam); *Khouzam v. Ashcroft*, 361 F.3d 161, 165 (2d. Cir 2004). The BIA abuses its discretion when it "provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner." *Ke Zhen Zhao v. U.S. Dep't of Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (internal citations omitted).

In its order denying Khan's motion, the BIA acknowledged that, although motions to reopen generally must be filed within 90 days of the final BIA order, this deadline can be tolled where an applicant was prejudiced by ineffective counsel. The BIA found, however, that Khan could not benefit from such tolling because she failed to establish that she exercised due diligence in pursuing her claim. We conclude that this finding was not an abuse of discretion, given Khan's failure to offer any account of the nearly three years that passed between the BIA's final decision on August 28, 2001, and Khan's filing of her motion on June 28, 2004. *See Cekic v. INS*, 435 F.3d 167, 171-72 (2d Cir. 2006) (finding that two year delay in filing motion after

petitioners discovered that their temporary protection had expired, with no explanation offered, supported BIA's denial for lack of due diligence).

On appeal Khan argues that because she clearly met the conditions for establishing ineffective assistance set forth in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), the BIA was wrong to impose any additional requirement on her. Yet it may well be that the BIA did not set forth any diligence requirement in *Matter of Lozada* because the gap in time was only six months, not, as here, nearly three years, or because the BIA found Lozada's motion deficient for other reasons.[2] And the law in this Circuit since at least 2000 has been that, to benefit from equitable tolling of the 90-day deadline, a movant must establish that she pursued her rights with due diligence. *See Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000); *see also Cekic*, 435 F.3d at 170-71.

Surprisingly, Khan offers no account here, and none below, of how it is that she only discovered her counsel's incompetence three years after she lost her case.[3] Indeed, it appears likely that, as in *Cekic*, *id.* at 134, Khan was content to let the final order against her stand and eventually sought new counsel, not to remedy defects in her previous proceedings, but rather to

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[2] Khan has also submitted a supplemental appendix of unpublished (and redacted) BIA decisions that, she argues, establish a BIA practice of granting motions to reopen wherever the movant satisfies the *Matter of Lozada* requirements. However, in only one of these–the November 23, 2004, decision–had any significant amount of time passed, by the time of the BIA's decision on the motion, since the BIA's initial decision. The November 23, 2004, order does not specify when the *motion* was filed, so it gives no indication of whether that motion was delayed; the order certainly does not refer to any untimeliness. Thus, none of the orders compiled in the supplemental appendix establish any practice, consistent or otherwise, of accepting motions to reopen at any point so long as they comply with *Matter of Lozada*.

[3] Khan argues that, at the very least, the BIA should have remanded the issue of due diligence for factfinding. But, as set forth above, it is the movant's burden to show that she acted diligently and Khan failed even to allege as much.

pursue a new avenue of relief. Thus, Khan provides no basis for distinguishing *Iavorski* or *Cekic*.

We have considered Khan's remaining arguments on this appeal and find them to be without merit. For the foregoing reasons, we DENY Khan's petition for review and motion for a stay of removal.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:_____
Oliva M. George, Deputy Clerk